Office Supreme Court, U.S.
FILED
FEB 27 1964
JOHN F. DAVIS, CLERK

No. 725

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

MOLLIE S. TAYLOR, MARY J. WAGNER, INEZ L. BOSTIC, JUANITA DONALDSON, GRACE KARNES, PHILLIP E. McBEE, FLOYD HALL, MINTA JUSTICE, OTIS KINNEY, DAVID W. HALL, DICIE P. NEWELL, VICTORIA BRANHAM, MARY B. GALBREATH, DELLA M. GLEASON, BEULAH KULI, MARIE H. HOLBROOK, ALBERT T. RUCKER, BETTY E. HALL, HAROLD JAMES COMER, FRANCIS C. BURNARD,

Petitioners,

v.

FRED H. JOHNSON, TRUSTEE UNDER THE WILL OF CLAY M. THOMAS, DECEASED, D/B/A ATLAS LINEN AND INDUSTRIAL SUPPLY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PRELIMINARY STATEMENT

This petition for certiorari was filed by the charging parties who were allowed to intervene in the proceeding below subsequent to the decision of the Court of Appeals. The National Labor Relations Board (hereafter referred

to as the "Board") did not petition for review. Consequently, petitioners' inclusion of the Board as a named petitioner in the caption is inaccurate and improper.

Petitioners' lack of accuracy also extends to the Statement of Questions Presented and the Statement of the Case. The former assumes facts squarely contrary to the findings of the Court of Appeals and the latter is merely a repetition of factual arguments which the Board made unsuccessfully in the Court below. For these reasons respondent has restated the Questions Presented and the Statement of the Case to reflect the bases for the decision of the Court of Appeals and the issues which are before this Court.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Did the Court of Appeals misapprehend or grossly mis-apply the controlling legal standard in denying enforcement of that part of a Board order which found that respondent violated Section 8(a)(3) of the National Labor Relations Act by discriminatorily discharging the charging parties?

2. Do petitioners who were charging parties in the proceeding before the Board have standing to seek review of a decision of the Court of Appeals which denied in part the Board's petition for enforcement where the Board declined to petition for certiorari and the charging parties did not intervene until subsequent to the decision of the Court of Appeals?

COUNTERSTATEMENT OF THE CASE

The essential facts pertinent to the issues before this Court are summarized in the opinion of the Court of Appeals. Since that Court found that the issue of discriminatory discharge was neither comprehended by the pleadings nor recognizable during the hearing, it was unneces-

sary for that Court to pass upon any of the other issues in the case. Since these other issues are similarly not before this Court we will limit this presentation to the procedural issue which was determinative in the Court of Appeals.

The complaint which was issued by the Regional Director of the Board's Ninth Region charged that certain employees of respondent engaged in an economic strike from April 9, 1959, to April 14, 1959, and that respondent failed to reinstate or reemploy the strikers at the termination of the strike in violation of Section 8(a)(3) of the National Labor Relations Act, as amended (hereafter referred to as "the Act"). A number of separate violations of 8(a)(1) were also alleged. There was no allegation of discriminatory discharge on April 10, 1959, or on any other date. These charges were litigated at a lengthy hearing during the course of which the trial examnier ruled without qualification that nothing would be found to be a violation if it were not alleged in the complaint.

The sequence of proceedings subsequent to the hearing was as follows:

Intermediate Report—Respondent was found to have violated Section 8(a)(3) by refusal to reinstate or reemploy the charging parties at the end of the strike *and by discharging the charging parties at the outset of the strike.* Separate violations of Section 8(a)(1) were also found. Exceptions were taken by respondent.

First Board Order (130 NLRB 761)

1. The finding of discriminatory discharge was not adopted because it was not alleged in the complaint and not litigated at the hearing.

2. The finding of discriminatory refusal to reinstate was adopted and respondent was directed to reinstate the charging parties with back pay. The findings of 8(a)(1) violation were also adopted.

First Petition for Enforcement—Filed by the Board April 19, 1961, and withdrawn without explanation on June 13, 1961.

Second Board Order (134 NLRB 1230 and 136 NLRB 922):

1. The previous finding of discriminatory refusal to reinstate the charging parties was set aside as not being supported by the evidence—but——

2. The previous finding that the trial examiner erred in finding a discriminatory discharge was also set aside and the trial examiner's finding was adopted.

3. Respondent's exceptions pointing out the rulings of the trial examiner that findings of violation would be limited to the allegations of the complaint were overruled and respondent was again directed to reinstate the charging parties with back pay.

On the Board's second petition for enforcement, the Court of Appeals granted enforcement of that part of the Board's Second Order which found violations of Section 8(a)(1) but denied enforcement of the finding of 8(a)(3) violation because respondent was not afforded reasonable notice and an opportunity to defend against the claim of discriminatory discharge.

Following the decision of the Court of Appeals the Board notified respondent of its obligation to post notices pursuant to the findings of 8(a)(1) violation. Respondent agreed to comply with this request if the Board did not intend to seek review of the denial of enforcement of the 8(a)(3) finding. Respondent received the Board's assurance that no further appeal would be taken by the Board and in reliance respondent posted the notices. Thus as far as the Board and the respondent are concerned the proceedings have terminated. The correspondence between respondent and the Board is set out at pages 12-13.

Petitioners did not intervene at any stage of the pro-

ceedings prior to the decision of the Court of Appeals and it was not until the Board made known its intention not to file a petition for certiorari that petitioners appeared on the scene with a motion to intervene in the proceedings below. The motion was allowed over the objections of both respondent and the Board.

REASONS FOR DENYING THE WRIT

1. The Court of Appeals Did Not Misapprehend or Misapply the Controlling Legal Standard in Determining that the Issue of Discriminatory Discharge Was Not Alleged in the Complaint or Litigated in the Hearing.

This Court has limited its scope of review of decisions of the Courts of Appeal in cases arising under the Act to:

> "... what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied" *Universal Camera v. N. L. R. B.*, 340 U. S. 474, 490-491 (1951).

This limitation is based on the primary responsibility which the Act gives to the Courts of Appeal for review of decisions of the Board, *NLRB* v. *Walton Mfg. Co.*, 369 U. S. 404 (1962), and upon the policy which this Court has stated of non-interference in cases where the decisions of the Courts of Appeal "depend on appreciation of circumstances which admit of different interpretations." *Federal Trade Commission v. American Tobacco Company*, 274 U. S. 543 (1927). Where the decision of the Court of Appeals is based on a conscientious evaluation of the record as a whole, this Court applies the policy of non-intervention regardless of whether this Court would have come to the same conclusion as the Court of Appeals if it were sitting in the place of the Court of Appeals. *NLRB* v. *Pittsburgh S.S. Co.*, 340 U. S. 498 (1951).

Within this framework it is clear that the decision of

the Court of Appeals should be respected. The standards applied by the Court of Appeals were:

> "Was respondent apprised or should it reasonably have been apprised by the complaint of the issues it was obligated to meet?" and,
>
> "Was the issue of discriminatory discharge fully litigated?"

Upon an evaluation of the record as a whole the Court of Appeals answered both questions in the negative.

The plain wording of the complaint discloses that discriminatory discharge was not within its purview. The complaint did not merely allege generalized violation of Section 8(a)(3) but rather the complaint alleged violation by specific acts, i.e., failure to reinstate and reemploy strikers at the end of the strike and thereafter. How this language could apprise respondent of an alleged discriminatory discharge on April 10 is beyond comprehension and we submit that the Court of Appeals understated the variance by the observation that:

> "No little juggling of theory is necessary in order to now place the issue of discriminatory discharge in the within complaint so as to have put respondent on the notice thereof"

Even prior to the Administrative Procedure Act, this Court held that a respondent could not be charged with notice of matters which were not alleged in the Board's complaint. *Consolidated Edison* v. *NLRB*, 305 U. S. 197, 234-235 (1938). The requirement of timely notice was formalized in the Administrative Procedure Act (5 U. S. C. 1004(a)), a statute which was described by the House Judiciary Committee as "... an outline of minimum essential rights and procedures" (H.R. 1980, 79th Cong., 1946 U. S. Code Cong. Service 1205). Hence petitioners' contentions that the complaint should be disregarded really

amount to objections to the wisdom of the Administrative Procedure Act. Finally, we think it is most significant that the Board reached the same decision as the Court of Appeals on the question in its first decision when its order was based on refusal to reinstate rather than discriminatory discharge.

In contending that the issue of discriminatory discharge was fully litigated, petitioners refer this Court to approximately 10 lines of testimony out of a record of 960 pages. The Court of Appeals, on the basis of the *entire record*, concluded that the issue had not been litigated. The Board also reached this conclusion in the first instance. The 10 lines selected by petitioners are surely no basis for concluding that the Court of Appeals grossly misapplied the standard. To comb a record after it is closed and come up with a scrap which might have been relevant to another issue is a far cry from showing that the issue was recognized and that both parties treated it as an issue in the case.

Petitioner stresses that the scraps which have been gleaned from the record were received without objection. There are several answers to petitioners' contentions:

(a) Respondent did object during the proceeding to evidence unrelated to any allegation in the complaint and the objections were overruled—but the trial examiner specifically limited such evidence to proof of background and motive and ruled that no findings of violation would be made beyond the allegations of the complaint. After this ruling it would have been ridiculous for respondent to continue to make the same objection. Respondent was, of course, unaware that the trial examiner would violate his own ruling and commitment.*

* The Board has subsequently ruled that same trial examiner for [illegible] of violation beyond the scope of the complaint, and [illegible] (1962).

(b) Respondent preserved its objection to evidence unrelated to the complaint by timely motions to strike made at the conclusion of the Board's case and at the conclusion of all evidence.

(c) There were a number of allegations of 8(a)(1) violation in the complaint in addition to the alleged refusal to reinstate the charging parties. Evidence which petitioners now seize upon as relating to the discharge issue, e.g., threats of discharge, were assumed to relate to 8(a)(1) allegations if not to background and motive.

Petitioners rely heavily upon *NLRB* v. *Mackay Radio and Telegraph Co.*, 304 U. S. 333 (1938). This reliance is misplaced. In *Mackay* the only variance between the complaint and the Board's findings was the terminology employed—*the events which formed the basis for the finding of violation were the same.* In the present case the events differ completely—discharge on April 10, 1959, vis-a-vis failure to reinstate on and after April 14, 1959. The Court of Appeals was not unaware of the *Mackay* case. Rather it found specifically that the case differed from *Mackay* because respondent neither recognized the discharge issue nor was the issue one which should have been perceived. Again, this finding was made upon consideration of the entire record—not mere isolated excerpts taken out of context.

Petitioners' final contention, that the decision of the Court of Appeals is in conflict with the decisions of other Courts of Appeal may be disposed of in short order. It is obvious that cases which reach the Courts of Appeal differ widely in the extent and significance of the variance between the complaint and the Board's findings. These cases also differ in the extent to which the respondent may have waived the variance by litigating the omitted issue. Consequently, in some cases (including those cited by petitioners) the variance has been found to be minor or to have

been fully litigated while in others, like the present, the variance has been found to vitiate the Board's decision.* Two decisions of this Court, *Mackay* and *Consolidated Edison* also consider this issue and arrive at different conclusions but those cases are not in conflict—*the facts were simply different.* Decisions based on factual differences obviously do not create a conflict within the meaning of Rule 19(b).

2. Petitioners Lack Standing to Petition for Certiorari.

Petitioners filed charges in mid-1959, which set in motion the machinery of the National Labor Relations Act. From that point forward the matter was within the sole jurisdiction of the Board. Pursuant to the statutory mandate the Board investigated the charges, issued a complaint and processed the case through hearing, decision, enforcement and compliance proceedings. Now the Board has determined that the purposes of the Act will not be effectuated by prolonging the litigation. Responsibility for the administration of the Act has been delegated to the Board, and just as the Board has sole authority to determine whether to seek enforcement of a Board order, the Board should have sole discretion to seek further review from an adverse decision.

The decision of this Court in *Int'l Union Mine Workers v. Eagle-Picher Co.*, 325 U. S. 335 (1945), does not aid petitioners. There the charging party intervened prior to the decision of the Court of Appeals and intervened again in support of a petition by the Board to vacate the order of the Court of Appeals. Since the charging party had participated in the case at the appellate level this Court held that the interest of the charging party in the decision

* E.g., *NLRB v. H. E. Fletcher Co.*, 298 F. 2d 594 (1 Cir. 1962); *NLRB v. Threads, Inc.*, 308 F. 2d 1 (4 Cir. 1962); *NLRB v. Lilco Mfg. Co.*, 210 F. 2d 631 (5 Cir. 1954); *NLRB v. Brazil Wood Co.*, 182 F. 2d 144 (7 Cir. 1951).

of the Court of Appeals was sufficient to support a petition for certiorari. Here petitioners' intervention was entirely "after the fact," and they have no comparable interest.

It is a basic tenet of the national labor policy that the Act does not create private rights. The Board acts solely as a public agent—"not to give effect to a private administrative remedy." *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U. S. 261, 269 (1940). However, petitioners do not even purport to seek enforcement of public rights. To the contrary, petitioners have a single objective—reinstatement with back pay—and in their view the Board was derelict in not pursuing their claim to the highest Court. This is the very antithesis of the national labor policy and we submit that petitioners should not be permitted to subvert the Board's role. Since the Board has not sought certiorari and since Respondent has complied with that portion of the Board order which was enforced the petition should be dismissed for lack of standing by petitioners. Alternatively, Respondent submits that since the Board, which has the responsibility for securing enforcement of the Act, has declined to petition for certiorari, the case does not involve any issues which are important to the administration of the Act and the petition should, therefore, be denied.

CONCLUSION

All litigation is important to those who are affected by the outcome but all litigation must also come to an end. The facts which gave rise to the present case are now five years old. Petitioners have had their day in Court and the Board, which has the responsibility of representing the public interest has decided to abide by the decision of the Court of Appeals and to forego further appeal. Respondent has similarly complied with the decision of the Court of Appeals. We submit that there are no special and im-

portant reasons to disturb the disposition of the case and that the petition should, therefore, be denied.

Respectfully submitted,

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APPENDIX A

October 30, 1963

Mr. Emil C. Farkas
Acting Regional Director
1200 Transit Building
6 East 4th St.
Cincinnati 2, Ohio

Re: Fred H. Johnson, Trustee Under the Will of Clay M. Thomas, Deceased, d/b/a Atlas Linen & Industrial Supply, Case No. 9-CA-1925 et al.

Dear Mr. Farkas:

This is in reply to your letter of October 25, 1963 concerning compliance with the remainder of the order of the board which was enforced by the Court of Appeals.

The Company is agreeable to posting the notice providing, however, that you are willing to indicate that no further appeal will be taken.

Very truly yours,

WARREN C. ARMSTRONG,
Personal Representative
Fred H. Johnson, Trustee
Under the Will of Clay M.
Thomas, Deceased

APPENDIX B

[N. L. R. B. SEAL]

NATIONAL LABOR RELATIONS BOARD
NINTH REGION
1200 Transit Building, 6 East Fourth Street
Cincinnati, Ohio 45202 Telephone: 381-1420

November 13, 1963

Mr. Warren C. Armstrong, Attorney
Armstrong, Speer & Millious
1350 West Fifth Avenue, Suite 300
Columbus 12, Ohio

Re: FRED H. JOHNSON, TRUSTEE UNDER THE WILL OF CLAY M. THOMAS, DECEASED, d/b/a ATLAS LINEN & INDUSTRIAL SUPPLY Case No. 9-CA-1925, et al.

Dear Mr. Armstrong:

Your letter dated October 30, 1963, was received in our office on this date. In response to your question, the National Labor Relations Board does not intend to take any further appeal in this matter. Therefore, please post the Notices in accordance with the instructions mailed to you on October 25, 1963.

Very truly yours,

/s ALVIN SCHWARTZ,
ALVIN SCHWARTZ,
Compliance Officer